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Nos. 98-1701; 98-1706

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA,
Petitioner,

vs.

GARY LOCKE,
Governor of The State of Washington, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE STEAMSHIP ASSOCIATION OF SOUTHERN CALIFORNIA AS *AMICUS CURIAE* IN SUPPORT OF THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO) AND THE UNITED STATES OF AMERICA

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BRIEF *AMICUS CURIAE*

INTERESTS SUPPORTED

This *amicus curiae* brief is submitted with the consent of all counsel of record in support of the position of the United States of America and of Intertanko. The brief was authored in whole by the *amicus curiae*, and no monetary contribution to the preparation or submission of this brief was made by anyone other than the *amicus*.

INTERESTS OF THE AMICUS

The Steamship Association of Southern California represents approximately ninety percent of the maritime industry in Southern California, which is where the two largest seaports in the United States are located. The Association is concerned that the position of the State of Washington herein will lead to increasingly incompatible and disorganized interference by each of the littoral states of the United States in foreign trade by sea. An excess of individual and incompatible regulation will adversely affect the ability of companies and consumers in the United States to rely upon low cost and reliable import and export of goods, as it will discourage trading by vessels.

MARITIME TRADE IS INHERENTLY INTERNATIONAL AND INTERSTATE

The "littoral" states, being states with an ocean coast line, are generally considered to comprise Hawaii, Alaska, Washington, Oregon, California, Texas, Louisiana, Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina, Virginia, Maryland, Delaware, New Jersey,

New York, Connecticut, Rhode Island, Massachusetts, New Hampshire and Maine. This list does not include states which lie on the Great Lakes or the great rivers, which also engage in international trade by sea, and which include Pennsylvania, Ohio, Michigan, Wisconsin and Illinois, and to a lesser extent Kentucky, Missouri, Tennessee and Arkansas. Altogether, if the Ninth Circuit opinion stands, a majority of the several states have an interest in creating their own local and distinct pollution and operational laws applicable to ocean vessels. This is a recipe for anarchy.

The international transportation of goods by sea is characterized by relatively low value of cargoes, bulky cargoes, or dense cargoes, since all of these are unsuited for carriage by airplane. Consequently, it is commercially desirable for each discrete parcel of cargo to be discharged at a port closest to its ultimate destination, to minimize the inland costs of delivery. This important factor means that vessels are increasingly required to call at numerous ports within the United States on each voyage. Port calls in multiple states are now the rule rather than the exception.

In an attempt to assist this Court with an understanding of the scope of the international trade as it affects California and its relations with the other states and foreign nations, the Association has examined all vessel records for the past five years. These are voluminous indeed. A sample, for the months of August 1995 to August 1999 has been selected (because August is a standard month without any unusual characteristics).

During a typical August, large commercial vessels call at Los Angeles and Long Beach from the following California ports -- Benicia, El Segundo, Estero Bay, Eureka, Martinez, Oakland, Oleum, Port Hueneme, Redwood City, Richmond, San Diego and San Francisco. The combined port of Los

Angeles/Long Beach claims to be the second busiest commercial port in the world. All such statistics are inherently flexible -- but it cannot be doubted that California's sea trade is a major component in the world economy.

Most of the vessels that call at the California ports listed above will also call at other U.S. ports in other states. The August records show that these vessels had just arrived from, or were going to, Anacortes, Anchorage, Baltimore, Baton Rouge, Brownsville, Camden, Cherry Point, Coos Bay, Corpus Christi, Galveston, Honolulu, Houston, Jacksonville, Kenai, Kitimat, Miami, New Orleans, Nikiski, Pascagoula, Port Angeles, Portland, Richmond, Savannah, Seattle, Tacoma, Texas City, Valdez or Vancouver, Washington. One or more ships was also trading directly as its next or last port to Pago Pago, St. Croix or San Juan, Puerto Rico. These records unequivocally demonstrate that interstate trade is an integral part of the voyage for most vessels that trade into or out of Southern California.

Because the records reviewed by the Association do not identify all ports on a vessel's voyage, it is impossible to reconstruct every aspect of the ocean trade into and out of California. However, in a typical August, a typical vessel that calls at California ports will also call at another port in another state of the United States, and will have come from or be bound to one of the following foreign ports - Acajutla, Amuay Bay, Antofagasta, Antwerp, Aruba, Auckland, Avon, Balboa, Balao, Banyuwangi, Brisbane, Busan, Cabo San Lucas, Callao, Caracas, Cartagena, Cedros Island, Chiba, Coleta Coloso, Colon, Corinto, Cristobal, Dakar, Dalian, Duncan Bay, Ensenada, Esmeraldes, Estodo, Frasier, Ghent, Gijan, Gladstone, Gold River, Greenock, Guayaquil, Guaymas, Hakata, Halifax, Hibikimada, Higashiharima, Hong Kong, Huasco, Inchon, Irago, Isonomaki, Kaohsuing,

Kashima, Kawasaki, Keelung, Kingston, Kinuura, Kobe, Kuantin, La Pallice, Las Ventana, Lazaro Cardenas, Majuro, Manila, Manta, Manzanillo, Marifu, Masan, Matsuura, Mazatlan, Miike, Mitukojima, Mitsushima, Montreal, Muroran, Nagasaki, Nagoya, Nigata, Nokhodka, Norito, Ofumato, Oita, Okinawa, Onahama, Ormoc, Osaka, Papeete, Penang, Puertos Armuellos, Bayomar, Bolivar, Caldera, Limon, Miranda, Quetzal, Rosarito Beach, Rotterdam, Sfax, Shanghai, Salina Cruz, San Juan de la Costa, San Marco, Santa Maria, Santos, San Luis, Sao Luis, Sao Paulo, "SEA", Shekou, Singapore, Soma, Suva, Sydney, Taichung, Talara, Tauranga, Tokyo, Tomakomai, Toyobashi, Ulsan, Valencia, Valparaiso, Vancouver, B.C., Vladivostok, Victoria, Yokohama, Yosu or Yunai.

This list demonstrates the diversity of ports -- but the industry can be analyzed further by examining the trades involved to show that international and interstate trade is the very essence of California's ocean experience.

One major group of vessels, the massive Generation III and IV container vessels, run regular routes from Japan, Korea or China to Los Angeles, Oakland, Portland, Vancouver, B.C., and Seattle, and then return. Another similar trade comes from Europe, with containers, and calls at East and Gulf Coast ports before passing through the Panama Canal, calling at West Coast ports, and sailing to the Far East. Two further trades in automobiles ply into West Coast ports, one from the Far East and the other from Europe, carrying many thousands of automobiles per voyage. Specialized fruit vessels bring bananas to the West Coast ports from Central America, while other, more generalized refrigerated vessels bring fruit and coffee from South America, and meat and Kiwi fruit from Australia and New Zealand. Another trade brings huge quantities of newsprint

down from Northern Canada to West Coast ports. These specialized trades have several features in common: they use specially designed and extremely valuable vessels, they call so often and so regularly that their crews have developed an expertise in navigation on American waterways that rivals the skills of the local pilots, and they invariably trade in numerous ports up and down the West Coast as part of a single schedule. Their specialized nature and dedicated trades mean that the price paid by consumers for newspapers, bananas, grapes, apples, coffee, Toyotas, Mazdas, Hyundais, Volkswagens, Land Rovers, Mercedes Benzes, computers, toys, calculators, lamb, wine, has only a minimal fraction of their cost attributable to transportation expenses.

Another group of vessels calls to pick up shiploads of single cargoes, and these vessels rarely call at more than one port to *load*: they load wood chips, timber, lumber, coal, petroleum coke, salt, sulphur. But they often arrive full with a discharge schedule that takes them to many ports in many states. These general purpose bulk vessels regularly call at six or seven Far East ports to load and four or five ports on the West Coast or a combination of West, Gulf and East Coasts to discharge their plywood panels, door skins, steel coils, I-beams, wire rod and galvanized pipes.

Other vessels call to load or discharge crude oil and distilled oils. Other very specialized "clean product tankers" regularly call up and down the coast at a multitude of ports discharging highly refined and very valuable cargos in small parcels. They frequently come from Texas and Louisiana refineries. One other group of vessels comes for a very limited purpose: these vessels call at California ports to "take on bunkers," which means replenishing fuel, diesel, or lubricating oils.

In the list of ports above, some ships identified their last port as "SEA." These ships had been directed to the U.S. West Coast "on spec" without a cargo. Their owner or operator then obtained a fixture and arrived: this business alone would be devastated if each U.S. states had particular, distinct and local requirements that differed from state to state.

Most vessels that call in California do so repeatedly, on a schedule, and trade to other states as an integral part of their international business. In this scheme of multiple, regular calls at ports on the West Coast and around the United States, it is essential that the shipowner, officers and crews be faced with a single set of safety and operating rules -- from the Coast Guard.

THE STATE REGULATIONS EXCEED THE POWERS THAT CONGRESS HAS DELEGATED

The issue before this Court is whether the provisions of "OPA 90" (33 U.S.C. § 2701 *et seq.*) that permit states to create "additional liability or additional requirements" have been preempted in respect of local regulation of tank vessels by the panoply of Coast Guard regulations. Within this issue is another: the proper relationship of the several states to the maritime power of the United States. This position was fully thought out by the Founding Fathers, and has been clearly stated in prior case law by this Court: **just as there are some rights of the States that Congress may not usurp, so there are national interests that Congress may not delegate to the states**. The regulation of maritime trade is one such protected area.

In a series of three seminal cases, *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086, (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 40 S. Ct..

438, 64 L. Ed. 834 (1920), and *Washington v. W.C. Dawson Company*, 264 U.S. 219, 44 S. Ct. 302, 68 L. Ed. 640 (1924), this Court clearly indicated that Congress cannot delegate its inherent powers over maritime commerce to the states.

This line of cases has not been modified in its effect on the operation of vessels in state waters by the language of *Askew v. American Waterways Operators*, 411 U.S. 325, 344, 93 S. Ct. 1590, 36 L. Ed. 2d 280 (1973); indeed, *Askew* appears to preserve this analysis in respect of vessel operations.

It is respectfully suggested that, if the delegatory language of OPA 90 has any force, it can only be construed in compliance with and in furtherance of actual Coast Guard regulation. Such language may not empower the states to create new or dissonant regulations because they would exceed Congress' power under the principles stated in the cases above.

CONCLUSION

This honorable Court is requested to reaffirm that the states may not be given by Congress the power to create unharmonious regulation of interstate and international commerce. It is a matter of the commercial lifeblood of this country.

Dated: October 21, 1999

Respectfully submitted,

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